

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HALL & ASSOCIATES
1620 I St., N.W.
Suite 701
Washington, D.C. 20006,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, Region 1
5 Post Office Square- Suite 100
Boston, MA 02109-3912,

Defendant.

Civil Action No. _____

COMPLAINT

Preliminary Statement

1. Through this action, brought under the Freedom of Information Act (“FOIA”), 5 U.S.C. §§ 552, *et seq.*, *as amended*, Plaintiff, Hall & Associates (“H&A”), appeals the Defendant’s, Environmental Protection Agency Region 1’s (“EPA R1”), (1) excessive fees charged for the work performed and (2) inappropriate redaction of factual information within the responsive documents.

2. The Great Bay Municipal Coalition (“the Coalition”) is comprised of municipalities that discharge directly into the Great Bay Estuary or into its tributaries. These municipalities are adversely impacted by EPA’s determination that they must achieve a transparency-based 0.3 mg/l total nitrogen (“TN”) instream requirement to allow eelgrass populations to recover. As explained in more detail below, the unprecedentedly-stringent nutrient

limitations were based on the New Hampshire Department of Environmental Services (“DES”) draft 2009 Numeric Nutrient Criteria document (“2009 Criteria document”), which the Coalition believes to be scientifically flawed. The Coalition asked EPA Headquarters (“EPA HQ”) to look into allegations of science misconduct on the part of EPA R1 in imposing nutrient limitations for the Great Bay communities and its reliance on the 2009 Criteria document. EPA HQ responded stating it found EPA R1 had not engaged in scientific misconduct, but did not offer any explanation on how it rendered its decision. H&A filed eighteen FOIA requests, on behalf of the Coalition, to gain an understanding of what documentation EPA HQ received from EPA R1 that convinced EPA HQ that the region had not engaged in science misconduct. The requests, specifically sought documentation regarding scientific conclusions that were claimed to exist in support of EPA R1’s position. The Coalition’s particular interest in the requested documents is that the Coalition’s communities have received final NPDES permits, or have been told by EPA that they will be receiving NPDES permits from EPA R1, based upon the 2009 Criteria document.

3. FOIA requires federal agencies to respond to public requests for documents, including the search and production of files maintained electronically, in order to increase public understanding of the workings of government and access to government information.

4. Despite claims that EPA R1 approach and findings were scientifically supported, EPA R1 failed to identify records supporting those findings. Moreover, the fee charged by EPA R1 for processing the Coalition’s FOIA requests is inconsistent with the work performed and excessive in light of the sparse responsive documents provided. Additionally, H&A believes one of the responsive documents was inappropriately redacted excluding factual information under the guise of the “deliberative, predecisional material” exemption. The deliberative process

exemption is not applicable when the Region has asserted that certain scientific facts have been demonstrated. Additionally, the excessive fee was in direct contradiction to the requests' instructions that EPA should "contact the undersigned if the associated search and duplication costs are anticipated to exceed \$250.00." H&A believes that EPA R1's actions were purposeful and represent a bad faith effort on the part of the Agency to respond to H&A's FOIA requests.

5. EPA's refusal to respond to these FOIA requests is also inconsistent with Executive Office Policy on FOIA compliance issued by President Barack Obama on January 21, 2009. The Executive Memorandum states:

The Freedom of Information Act should be administered with clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failure might be revealed, or because of speculative or abstract fears. ... All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

6. Refusal to respond is also inconsistent with the Clean Water Act section 101(e) and 40 C.F.R. § 123.1, which requires the public disclosure of information used as the basis for permit decisions.

Jurisdiction

7. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the Defendant pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

Venue

8. Venue is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

Parties

9. Plaintiff, H&A, is a Professional Limited Liability Company organized under the laws of the District of Columbia. H&A's primary purpose is to serve as a regulatory consultant and/or special counsel to municipal and private entities regarding environmental matters. Specifically, the firm has addressed wastewater regulatory issues in every EPA Region, over 40 states, and at EPA Headquarters in Washington, D.C.

10. Defendant, EPA R1, is an agency of the federal government of the United States, within the meaning of 5 U.S.C. § 552(e), and whose headquarters is located in Washington, D.C. EPA R1 is in possession and/or control of the records requested by H&A which are the subject of this action.

Factual Allegations

11. By letters dated September 26, 2012, on behalf of the Coalition, H&A submitted a series of eighteen FOIA requests to EPA R1 which sought disclosure of records associated with EPA R1's proposed NPDES permits for Exeter, NH, NPDES Permit No. NH0100871 (released Mar. 25, 2011); Newmarket, NH, NPDES Permit No. NH0100196 (released Nov. 5, 2011); and Dover, NH, NPDES Permit No. NH0101311 (released Jan. 6, 2012) *available at* http://www.epa.gov/region1/npdes/draft_permits_listing_nh.html, which contained a 0.3 mg/l TN instream requirement to improve transparency and allow eelgrass recovery in the tidal rivers and Great Bay. The impacted cities obtained extensive testimony under oath confirming that certain scientific conclusions and assumptions underlying the 2009 Criteria document were either (1) demonstrably incorrect or (2) unsupported for the Great Bay Estuary. These were the same state officials and local experts that had collaborated to create the 2009 Criteria document. EPA determined it was appropriate to ignore these conclusions/admissions in issuing the permits.

Specifically, the requests asked for all analyses of information for the Great Bay Estuary that showed the following statements were incorrect:

- a. Dr. Fred Short has not conducted research in the Great Bay Estuary that was designed to demonstrate what factors are causing changes in eelgrass populations. (*See Exhibit 1*).
- b. Cause of eelgrass loss in tidal rivers is unknown. (*See Exhibit 2*).
- c. A large increase in rainfall and major floods occurring in 2006 (a natural condition) could be the primary cause of significant eelgrass declines that occurred in Great Bay during that period due to increased turbidity and CDOM. DES failed [in declaring that Great Bay was nutrient impaired] to assess the importance of these events in triggering the eelgrass decline in the system despite the obvious temporal correlation. (*See Exhibit 3*).
- d. [In the Great Bay Estuary] numeric TN criteria for eelgrass and DO were not based on a demonstrated 'cause and effect' relationship [for this system] ... (*See Exhibit 4*).
- e. There is no analysis of data from the Great Bay Estuary demonstrating increasing TN levels caused changes in the eelgrass population in (a) tidal rivers in the Great Bay estuary or (b) Great Bay/Little Bay. (*See Exhibit 5*).
- f. There is no analysis of data from the Great Bay Estuary demonstrating macroalgae growth caused changes in the eelgrass population in Great Bay/Little Bay. (*See Exhibit 6*).
- g. There is no documentation showing that excessive macroalgae growth is occurring in the tidal rivers in the Great Bay Estuary. (*See Exhibit 7*).
- h. Epiphytes have not been demonstrated to be a major factor adversely impacting eelgrass populations in the Great Bay Estuary. (*See Exhibit 8*).
- i. Algal levels [in Great Bay/Little Bay] did not change materially from 1980 to present, despite an estimated 59% increase in TN levels between 1980 and 2012 *and therefore TN inputs could not have caused changed transparency [in Great Bay/Little Bay]*. (*See Exhibit 9*).

- j. There is no analysis of data from the Great Bay Estuary demonstrating transparency caused changed in the eelgrass population in (a) tidal rivers in the Great Bay Estuary or (b) Great Bay/Little Bay. (*See Exhibit 10*).
- k. Data for tidal rivers (Squamscott, Lamprey, Piscataqua) shows TN control will not meaningfully improve transparency. (*See Exhibit 11*).
- l. Existing transparency is too poor to support eelgrass in tidal rivers (Squamscott, Lamprey, Upper Piscataqua) because of the naturally high turbidity and CDOM. (*See Exhibit 12*).
- m. Great Bay is not a transparency limited system because eelgrass populations sufficient light during the tidal cycle. (*See Exhibit 13*).
- n. The best available information shows that transparency in Great Bay and Lower Piscataqua River did not change materially from 1990 to 2002; *therefore this parameter could not be a factor causing eelgrass declines found in the system prior to that time as assumed in the draft 2009 numeric criteria*. (*See Exhibit 14*).
- o. Transparency in the major tidal rivers (Squamscott, Lamprey, Upper Piscataqua) is poor, but the available data [] shows that: (1) the effect of algal growth on transparency is generally negligible [and] (2) CDOM and turbidity are the key factors controlling transparency in this area of the system. (*See Exhibit 15*).
- p. Since 2005, there has been ‘no site-specific research’ conducted that was designed to ‘evaluate the cause of recent eelgrass declines anywhere in the Great Bay system. To date, the causes of such eelgrass declines remain unknown. (*See Exhibit 16*).
- q. The various DES analyses [submitted to EPA] that confirmed (1) TN increases did not cause changes in transparency, algal levels or DO and (2) a ‘cause and effect’ relationship between TN and transparency/DO did not exist, were excluded from the technical information presented in the 2009 numeric nutrient criteria document, and therefore, were never presented to EPA’s internal peer review panel. (*See Exhibit 17*).
- r. Dissolved nutrient concentrations (2009-2011) have returned to pre-1995 levels when eelgrass thrived in Great Bay. There is no information from the Great Bay Estuary showing this level of TIN will impair the eelgrass population. (*See Exhibit 18*).

12. The FOIA requests stemmed directly from the Coalition's science misconduct letter sent to EPA Administrator Lisa Jackson and Inspector General Arthur A. Elkins, Jr. requesting (1) a review of the Great Bay water quality criteria compliance and permitting be withdrawn from EPA Region I and transferred to an independent panel of experts who can assess the scientific basis of the Region's position and (2) the Region's actions leading to that request be investigated by the Office of Inspector General. By letter dated September 27, 2012, Nancy Stoner, EPA's Acting Assistant Administrator, responded to the Coalition's letter by stating EPA HQ "has not seen any evidence that Region I engaged in scientific misconduct." The letter did not offer any explanation that indicates specific scientific issues raised by the Coalition were actually in error or false. Accordingly, the FOIA requests asked EPA to provide the documents supporting statements either made by EPA or DES officials, experts relied upon by EPA or DES, or from the Fact Sheet of the Newmarket, NH NPDES permit which EPA R1 would have had to compile and sent to EPA HQ during EPA HQ's investigation into the science misconduct allegations.

13. By separate letters from EPA R1, all dated September 26, 2012, these eighteen FOIA requests were respectively assigned the following reference numbers: 01-FOI-00252-12 through 01-FOI-00269-12. (*See* Exhibits 19-36).

14. By letter dated October 22, 2012, EPA R1 informed H&A that all eighteen FOIA requests did "not reasonably describe the records being sought as required by 40 C.F.R. § 2.102(c) and are improper." (Exhibit 37, at 2). EPA R1 went on to state: "These record requests are, in effect, asking Region 1 to examine thousands of pages of records within the agency to ascertain whether any information in them can be construed as relevant to the statements in the requests ... A FOIA request that necessitates the agency to formulate opinions and analyses or to

effectively conduct research or other services in order to respond to a request is not appropriate under FOIA.” (*Id.*). The letter further noted H&A’s opportunity to modify its requests or if H&A considered the letter to be a denial, H&A’s right to appeal the adverse determination. (*Id.*).

15. By letter dated November 6, 2012, H&A clarified the scope of the documents sought under the original eighteen FOIA requests. Specifically, H&A clarified that the eighteen FOIA requests were asking for the documents that “Region 1 may have already gathered and sent to EPA Headquarters during EPA Headquarters’ investigation into the Coalition’s allegations of science misconduct on specific issues identified in each of the individual FOIA requests.” (*Id.* at 2).

16. On November 16, 2012, EPA R1 confirmed receipt of the November 6th letter. (*See* Exhibit 39). Additionally, EPA R1 determined it could now process the clarified FOIA requests. (*Id.*).

17. Additionally, on November 16, 2012, EPA released the final NPDES Permit for the town of Newmarket, NH, NPDES Permit No. NH0100196, *available at* http://www.epa.gov/region1/npdes/permits_listing_nh.html.

18. By letter dated November 30, 2012, EPA R1 responded to the original eighteen FOIA requests which were clarified by the November 6, 2012 letter. (*See* Exhibit 40). EPA R1 produced or identified four documents, of which, three contained redacted portions allegedly under FOIA Exemption 5 exempting from mandatory disclosure “[i]nter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the affected agency.” (*See* 5 U.S.C. § 552(b)(5); 40 C.F.R. § 2.105(a)(5)). In addition, EPA R1 informed H&A’s of its opportunity to appeal this partial denial.

19. By letter dated December 12, 2012, EPA R1 submitted the bill for the eighteen FOIA requests. (*See* Exhibit 41). EPA assessed a fee of \$413.90 for 1.5 hours for searching for the records, 8.5 hours for reviewing the documents, and copying 26 pages. In addition, EPA informed H&A that “[f]or administrative reasons related to the use of EPA’s electronic FOIA management system, the FOIA request Numbers have been superseded” with FOIA requests reference numbers 01-FOI-00252-12 through 01-FOI-00269-12 now being assigned the following reference numbers EPA-R1-2013-000014 through EPA-R1-2013-000031, respectively.

20. Additionally, on December 12, 2012, EPA released the final NPDES Permit for the town of Exeter, NH, NPDES Permit No. NH0100871, *available at* http://www.epa.gov/region1/npdes/permits_listing_nh.html. To date, the town of Dover, NH, NPDES Permit has not been finalized.

21. On December 14, 2012, the Coalition filed a petition for review of the town of Newmarket, NH, NPDES Permit No. NH0100196 with the Environmental Appeals Board.

22. By letter dated December 20, 2012, H&A appealed EPA R1’s adverse determinations. (*See* Exhibit 42). Specifically, H&A challenged the responsiveness of the documents produced by EPA R1 because the documents did not respond to the FOIA requests (*Id.* at 2-3), the propriety of EPA R1’s fee of \$413.90 (*Id.* at 3), and the legitimacy of withholding the redacted factual information. (*Id.* at 3-4).

23. By letter dated January 3, 2013, EPA R1 confirmed receipt of the H&A’s December 20, 2012 FOIA appeal letter. (*See* Exhibit 43). Additionally, EPA-R1-2013-000014 through EPA-R1-2013-000031 were assigned appeal tracking numbers EPA-HQ-2012-003400 through EPA-HQ-2012-003417, respectively.

24. By letter dated January 17, 2013, EPA issued an interim response to the eighteen FOIA requests appeals (EPA-R1-2013-000014 through EPA-R1-2013-000031) and stated it would be consolidating them with nine outstanding EPA HQ FOIA appeals (EPA-HQ-2013-000711 to EPA-HQ-2013-000717, EPA-HQ-2013-000197, and EPA-HQ-2013-000723) sent by H&A, on the behalf of the Coalition, because they were “related to the same general subject.” (See Exhibit 44 at 1). EPA stated it would need more time to respond to the twenty-seven FOIA appeals in order to “consult with the appropriate program offices in Region 1 and Headquarters.” (*Id.*). The letter stated EPA “expect[ed]” to respond within 20 days. (*Id.* at 2).

25. By letter dated January 28, 2013, H&A objected to EPA’s decision to consolidate the EPA HQ and EPA R1 appeals. (See Exhibit 45). Specifically, H&A stated that although both set of FOIA appeals dealt with the Office of Water’s determination that Region 1 had not engaged in any scientific misconduct, the nature of the requests and issues under appeal were different. (*Id.*). The EPA HQ FOIA appeals challenged the Headquarters’ determination that the FOIA requests were insufficiently clear and the fee assessed excessive and inappropriate for the work performed. (*Id.*). The EPA R1 FOIA appeals concern the nonresponsive nature of the documents provided by the Region and the Region’s decision to redact factual information in a responsive document. (*Id.* at 1-2.). The EPA R1 appeals also address the inappropriate fee based on the Agency’s claim that it took eight-and-a-half hours to review eighteen pages of documents. (*Id.* at 2.).

26. By letter dated March 20, 2013, EPA issued its final determination with regards to the eighteen outstanding EPA R1 FOIA appeals denying each of the three issues on appeal. (See Exhibit 46). EPA R1 restated its position that the FOIA requests did not properly specify the records being sought and that there are no other responsive documents to the modified request.

(*Id.* at 1-2). The appeal was also denied with respect to the fees charged and the challenge to the redacted portion of the draft letter dated June 5, 2012. (*Id.* at 2-3).

Count I: Violation of the Freedom of Information Act

27. Paragraphs 1 through 26 are hereby incorporated by reference.

28. EPA's failure to provide a legitimate basis and rationale for withholding responsive documents is in violation of FOIA. *See* 5 U.S.C. § 552(a)(4)(B).

29. EPA's failure to fully and completely respond to each of H&A's individual FOIA requests violates the express provision of FOIA. *See* 5 U.S.C. § 552(a)(3).

30. EPA's assessment of \$413.90 for processing the Coalition's FOIA requests is inconsistent with the work performed and excessive in light of the four documents provided. The fact the Region is claiming that reviewing eighteen pages took 8.5 hours is inappropriate.

31. EPA claim that one of the four responsive documents (the June 5, 2012 draft letter) is, in essentially its entirety, exempt from disclosure under exemption 5 of FOIA (5 U.S.C. § 552(b)(5); 40 C.F.R. §2.105(a)(5)), is meritless. Exemption 5 exempts "inter-agency, intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" from disclosure under FOIA. The purpose of the having the exemptions to FOIA is not to allow the agency to hide behind a shield withholding information from the public. *See* 33 U.S.C. § 1251(e). NPDES regulations require public disclosure of information that supports the basis of a draft NPDES permit. However, it is highly improbable that three and half pages of a four page draft letter intended to respond to highly fact specific allegations of impropriety do not contain a single factual statement. Thus, the Agency erred by not disclosing the factual statements contained within the June 5, 2012 draft letter. Moreover, to

the extent this redacted information reveals evidence of agency wrong doing, EPA has no basis to withhold it regardless of the deliberative nature.

32. The FOIA requests specifically pertain to documents regarding whether the Region engaged in misconduct. Courts have routinely held that FOIA exemptions do not apply if the requested records may reveal that the government engaged in misconduct.

Relief Requested

WHEREFORE, Plaintiff, H&A, prays that this Court:

- (1) Maintain jurisdiction over this action until EPA is in compliance with FOIA, and every order of this Court;
- (2) Enjoin EPA from charging Plaintiff unreasonable fees given the work performed;
- (3) Enjoin EPA from withholding all responsive records, or portions thereof, that were requested by Plaintiffs, and order their immediate disclosure to Plaintiff;
- (4) Order EPA to respond to each of Plaintiff's requests fully and completely in a manner that will allow H&A to gauge the adequacy of the response;
- (5) Award reasonable costs and attorneys' fees to H&A as provided in 5 U.S.C. § 552(a)(4)(E) and/or 28 U.S.C. § 2412(d); and
- (6) Grant such other relief as the Court may deem just and proper.

Respectfully submitted,



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